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THE SUPREME COURT AND LITIGATION ACCESS FEES: THE RIGHT TO PROTECT ONE'S RIGHTS*—PART H

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OUTLINE

In Part I of this Article,[1] I described and set about to criticize a rule regarding claims by indigent persons to be relieved of court access fees, a rule which seems to be emerging from recent decisions of the United States Supreme Court.[2] The emergent rule, as I described it, "defines a subgroup (call it X) of all persons, such that whenever a person is within X, that person is denied due process if he is refused access to

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1. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153 [hereinafter cited as *Part I*].

2. Ortwein v. Schwab, 410 U.S. 656 (1973); United States v. Kras, 409 U.S. 434 (1973); Boddie v. Connecticut, 401 U.S. 371 (1971).

court because of inability to pay a state-imposed fee"; and *X*, under the emergent rule, "means any of the following: a defendant in criminal proceedings, a defendant in civil proceedings, or a plaintiff in civil proceedings seeking vindication of a constitutionally favored or 'fundamental' interest where relief is unobtainable extrajudicially." My aim in Part I was not to appraise the emergent rule's soundness or necessity as an elaboration of prior legal doctrine and precedent, but rather was to show that there is "no combination of plausible moral principles" which can explain or justify a rule that accords protection to members of *X* but withholds protection from certain other civil plaintiffs—a group of others which turns out to be "so broad and inclusive that one might as well refer to civil plaintiffs generally." Such a showing, I said, "will not itself establish that indigent civil plaintiffs generally are constitutionally entitled to access-fee relief, but it will be an important step along the way."[3]

The discussion now shifts its focus from the realm of moral principle to that of legal doctrine, including constitutional texts and related judicial holdings. I do not wish to suggest that the two realms can ultimately be held apart. To the contrary, I would affirm that judges elaborating doctrine, and critics of the judicial product, must strive to produce a collection of holdings or equivalent statements which are appreciably coherent; and I do not know what could impart coherence to a body of doctrinal statements save their joint consistency with some body of principle not wholly accessible through the statements alone, and in that sense external to the statements. I accept that the principles which can impart needed coherence to judicial holdings and dicta need not be static ones, but may be always evolving and not fully discoverable or determinable at any given moment.[4] From this it seems to follow that criticism appealing to principles must often be inconclusive. Decisions which appear inexplicable in terms of currently understood principle may be signs that the evolution of principles continues and a new synthesis impends.

But not every judicial decision which seems discordant within an extant theoretical environment must be received as a harbinger of some brave new reconceptualization. To be sure, one might boldly imagine that the *Boddie, Kras,* and *Ortwein* decisions, with their emphasis on the possibility of out-of-court interchange between the disputants as a way of resolving claims of right, foreshadow a new, reigning conception of legal rights as expressions of publicly shared values to which

3. *Part I* at 1169-70.

4. *See* Dworkin, *The Original Position,* 40 U. CHI. L. REV. 500, 509-14 (1973).

voluntary acquiescence can normally be expected and which, indeed, can be fully realized only through voluntary acquiescence. Such an interpretation could not be refuted merely by showing that other, roughly contemporaneous decisions seem to point in a different direction.[5] A more fundamental hindrance to seeing the notion of rights-as-shared-values as an inspiration for the access-fee decisions, might be that the notion clashes with a vision of human nature and associated concepts of law, rights, and the judicial role, which seem implicit in the Court's assumption of the very powers of constitutional review it has been exercising in these cases.[6] The Constitution calls itself supreme "law," and it purports to establish "rights" (and such cognate or subsidiary entities as "liberty," "property," and certain "freedoms"). Judicial review of executive and legislative action evidently proceeds upon the belief that "law" and "rights" necessarily entail authoritative interpretation and enforcement by an entity standing dispassionately outside the context of interaction which has brought the claimed law or right into question; and it thus harmonizes with a vision of human nature, well established in the liberal tradition, which inclines us to a workaday understanding of law and rights not as the product of shared values but as limited, tactical sacrifices of freedom, made for the sake of maximizing freedom generally by forcibly protecting it against the worse incursions of unruly humanity.[7]

Aside from the dim possibility that they betoken some profound alteration of theoretical perspective, the access-fee decisions can be counted wrong if they are inexplicable in terms of currently available principle, as that is reflected in contemporaneous doctrine. Having focused in Part I on issues of principle considered without regard to

5. *See, e.g.*, Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), where the Court can be understood as saying that legally compelled disclosure and explanation by officials of their reasons for treating a citizen adversely, accompanied by opportunity for the citizen to participate in examining those reasons, serves a useful purpose and therefore is required by the due process guaranty only where the citizen has some judicially enforceable right at stake. This view of the *Roth* case is developed and explored in an essay I am preparing for NOMOS (to be published by Atherton Press, New York, late 1974).

6. *See* Cooper v. Aaron, 358 U.S. 1, 17-18 (1958) (opinion of the Court); *id.* at 21-25 (Frankfurter, J., concurring); Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 21-29.

7. *See* Kennedy, *Legal Formality*, 2 J. LEGAL STUDIES 351 (1973). *Compare* Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 993-98 (1973). That there may be certain cases in which legal rights are conceived to exist naked of judicial remedies—for example, cases involving sovereigu immunity or "political questions"—does not contradict my general statement. Indeed, the fact that these cases are so terribly vexing and problematic tends to confirm that statement.

contemporary constitutional-law doctrine, I want in the remainder of this article to examine whether that doctrine will support the conclusion towards which the prior discussion plainly gravitates.

One might as well begin with the question of what the constitutional texts will bear. My chief texts will be the due process clauses. It seems evident that the language of these clauses will easily accommodate a decision invalidating court access fees as applied to indigent, would-be civil plaintiffs. One might want to say that the word "property" encompasses legally established expectations of relief in the form of a judicial judgment or decree whenever certain conditions prevail or certain events have occurred, and that the state commits a "deprivation without due process of law" when it prevents fulfillment of such expectations by charging an access fee. Alternatively, we can (as a tentative formulation) say that "liberty" encompasses the interest in pressing litigation as far as the provable facts and prevailing law will carry you, and that the state deprives you of that part of liberty without due process when it exacts a price for enjoyment which you are unable to pay. I shall rely on the second sort of formulation. Its main advantage is that it avoids the circularity so often encountered when a legal claim depends on a debatable assertion that something is "property." If "property" is to be defined in terms of legally justified expectations, then, since the access fees are a long-standing element in the legal backdrop, one's property might not include the right to litigate *free of fees*.[8]

There, then, is my doctrinal proposition: opportunity to litigate, whenever such opportunities are normally available to the citizenry at large, is one of those special components of due process liberty variously called a "basic liberty," a "preferred freedom," or a "fundamental interest."[9] My arguments in support of this proposition are advanced within a certain methodology which the Supreme Court has been evolving for dealing with claims, founded on the due process and

8. *See* United States v. Kras, 409 U.S. 434, 463 n.6 (1973) (Marshall, J., dissenting). *Cf.* Arnett v. Kennedy, 94 S. Ct. 1633 (1974) (plurality opinion of Rehnquist, J.). *But see* Comment, *The Heirs of* Boddie: *Court Access for Indigents After* Kras *and* Ortwein, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 570, 586-87 (1973).

9. Other articles and notes cited herein—perhaps especially that of Professor Goodpaster, note 23 *infra*—have developed arguments for treating litigation access as a "substantive" right enjoying a protected status under the due process clauses. I have also had access to an unpublished effort, Wille, *The Development of a Constitutional Right to Court Access* (1973), a paper submitted by one of my seminar students at about the time my first draft had been completed. A few of the more obvious points of contact between our efforts are noted below. My indebtedness to Mr. Wille may well be broader, by reason either of my reading of his paper or of oral exchanges between us.

equal protection clauses, for judicial protection of personal interests or rights. The methodology is distinguished by two characteristics: (i) it allows for varying degrees of judicial protection—varying levels of "strictness" of review—depending on what right or interest it is for which protection is claimed; and (ii) it ranks or classifies rights and interests, for this purpose, according to the clarity and force with which the Constitution—either specific texts or the whole constitutional plan—seems to single out various rights and interests as needing or deserving special protection. The notion of strictness of review itself is treated as containing two subquestions: (a) What governmental objectives, or what sorts of objectives, will be allowed to count as reasons for encroaching on the protected interest or right, and (b) how "tight a fit" will be required between the government's justifying objective and its questioned practice? (How insistent will the Court be on resort to "the least restrictive alternative"?)

Much recent discussion about this methodology has considered whether the two major dimensions—nature of the interest, strictness of review—are or ought to be treated as calling for relativistic evaluation along continuous, bi-polar scales, or rather as posing "either-or" questions of assignment to dichotomous categories.[10] In the "two-tiered" or "either-or" version, an interest either is or isn't classed as "fundamental," while review is either "strict" or "loose." A fundamental interest begets strict review; other interests occasion only loose review. In the "continuous" version, the closer an interest lies to the "fundamental" pole, the stricter the review it evokes. Also possible are hybrid versions, as well as conceptions of altogether greater sophistication and complexity.[11] For example, one significant variant seems to be that in which (i) an either-or question is asked about whether an interest has received any special recoguition in the Constitution; (ii) if the answer is no, review is denied entirely; and (iii) if the answer is yes, review is to be substantial, with its specific content and strategy shaped by the nature and importance of the interest.[12]

A minimally activist, maximally modest formulation of a general rule issuing from the evolving methodology in any of its versions

10. *See, e.g.*, Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

11. *See* Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

12. A very recent decision which suggests this hybrid is Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974). *See also* Nowack, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classification*, 62 GEO. L.J. 1071 (1974).

might be: governmental practices which hamper enjoyment of constitutionally recognized ("protected") rights and interests are unsupportable if the practices could be altered so as to reduce significantly their hampering effects, without jeopardizing any substantial governmental interest over and above the interest in convenience and efficiency of internal administration.[13] An ostensible corollary of this rule, one which received special attention and explicit restatement in the *Rodriguez* opinion, is that the charging of fees by the government for the exercise of protected rights or enjoyment of protected interests is a highly suspect practice insofar as the fees are imposed with exclusionary effect.[14]

I shall be trying to show that a person's interest in obtaining a fair hearing, when he claims that a legal entitlement of his has been violated, is one of those constitutionally recognized and protected interests to which the foregoing formulations apply, irrespective of whether the alleged violator is a public official or a private agent. According to *Rodriguez*, the "importance of a service . . . does not determine whether it must be regarded as fundamental" and "social importance is not the critical determinant for subjecting state legislation to strict scrutiny." Rather, "the answer lies in assessing whether [the claimed right is] . . . expressly or implicitly guaranteed by the Constitution."[15] Yet express mention of the interest or right is not required. "The constitutional underpinnings of the right to equal treatment in the voting process can no longer be doubted even though . . . 'the right to vote in state elections is nowhere expressly mentioned.' "[16] Nor, as has often been noted, is "privacy" or "association" expressly mentioned; yet it has evidently been the special values that these two words evoke for the Court which have prompted holdings that private choice about certain matters is constitutionally protected against governmental usurpation.[17]

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13. *See* Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974).

14. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 20 (1973) (dictum). As to whether the exclusionary-fee rule truly is a corollary of the convenience-and-efficiency rule, see text accompanying notes 107-12, *infra*.

15. *Id.* at 30, 32, 33-34. In the context of the *Rodriguez* discussion, the word "service" can fairly be taken as including such varied benefits as legal representation, education, access to the vote, freedom to marry, procreate, or travel.

16. *Id.* at 34 n.74, *quoting* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 665 (1966).

17. The matters include *procreation*, Skinner v. Oklahoma, 316 U.S. 535 (1942), as interpreted in United States v. Kras, 409 U.S. 434, 444 (1973), and in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 4 n.76 (1973); *abortion*, Roe v. Wade, 410 U.S. 113 (1973); *marriage*, Loving v. Virginia, 388 U.S. 1 (1967), as interpreted in Boddie v. Connecticut, 401 U.S. 371, 376 (1971), and in United States v.

It will be a part of my task to show that due process, in its narrowest, most distinctive, and most conventional ("procedural") sense of a defensive right to be heard, is no less expressive of or instinct with an unmentioned plaintiff's right to a fair hearing than is the equal protection clause with its unmentioned right "to participate in elections [or in the voting process] on an equal basis with other citizens in the jurisdiction,"[18] or are the first, third, fourth, and fifth amendments with their unmentioned right of family privacy.[19]

There may be another possiblity. Some fundamental rights may be inferred not from the text of the Constitution but from its metatext—from the complex of understandings which seemingly must underlie the whole governmental system therein established.[20] Most no-

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Kras, 409 U.S. at 444; *divorce*, Boddie v. Connecticut, 401 U.S. 371 (1971), as interpreted in United States v. Kras, 409 U.S. at 440-46, 449-50; *receipt and possession of information*, Stanley v. Georgia, 394 U.S. 557 (1969); and *child rearing*, Meyer v. Nebraska, 262 U.S. 390 (1923), as interpreted in Boddie v. Connecticut, 401 U.S. at 376, and in United States v. Kras, 409 U.S. at 444.

18. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973), *citing* Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Oregon v. Mitchell, 400 U.S. 112 (1970); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963).

19. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 34 nn.73, 76 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

20. *Cf.* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 17-19 (1971); Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 60.

Mr. Bork (whom Professor Winter follows) speaks of "deriv[ing] rights from governmental processes established by the Constitution," a course of reasoning which he distinguishes from that of "tak[ing] from the document rather specific values that text or history show the framers actually to have intended . . . ." Bork, *supra* at 17. Another distinctiou apparently embraced by Mr. Bork is that between rights which are "possessed by the individual because the Constitution has made a value choice about individuals" (call these "intrinsic" rights) and rights which are "located in the individual for the sake of a governmeutal process that the Constitution outlines . . . because his enjoyment of them will lead him to defend them in court and thereby preserve the governmental process from legislative or executive deformation" (call these "instrumental" rights). *Id.* Mr. Bork seems to say (but without offering any explanation for this view) that all the "derived" (what I have called "metatextual") rights are of the instrumeutal sort. Adopting the Bork categories, one might be attracted by the thought that there is an instrumeutal ground for "deriving" coustitutional protection of the litigation rights *of those who contend against the government* (and especially criminal defendants?), since the exercise of such rights seems calculated to "preserve the governmental process from . . . deformation;" and through such thinking oue could perhaps avoid a parallel inference of constitutioual protection for civil litigation rights. But why must or should the inference of rights from the whole constitutional plan be limited to those which fit the instrumentalist, countervailing-power perspective? Why may not the whole constitutional plan with equal force imply a recognition of intrinsic rights? Why may it not project an ideal conception of human good or need—or of

tably, the right "to participate in elections [or in the voting process] on an equal basis with other citizens in the jurisdiction," though the Court has ascribed it to the equal protection clause, may also spring from metatextual sources; and I shall argue in the next section that, insofar as it does, so does a right of equal juridical participation.

A. Establishing "Protected" Status for the Court-Access Right

1. *The Metatextual Argument: Voting and Litigating Compared*

There are a number of striking resemblances between the interests in voting and in litigating.[21] Some of these resemblances could be called rhetorical, consisting as they do of statements loosely descriptive of both voting and litigating, which are not susceptible of anything approaching rigorous demonstration. Both the voting and litigating interests base a claim to "fundamentality" on the idea that they are "preservative of all rights";[22] of both it can be said that "in social compact terms, in exchange for this legal and orderly method of resolving disputes, one restricts his power to satisfy his claims by force."[23] It is said that "ability to litigate just claims, like availability of the franchise, gives legitimacy to the state's coercive power."[24] The second Justice Harlan shared these perceptions:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call "the state of nature."
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> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settle-

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role, or citizenship, or social relations—which compels the recognition of some right, say a right of civil litigation, for noninstrumentalist, nonutilitarian reasons?

21. *See* Wille, *supra* note 9, at 19.

22. Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667 (1966), *quoting* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

23. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 Iowa L. Rev. 223, 251 (1970).

24. *The Supreme Court, 1970 Term*, 85 Harv. L. Rev. 104, 109-10 (1971).

> ment, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just.[25]

Justice Harlan's eloquence may help put us in a frame of mind receptive to the analytical resemblances between the voting and litigating interests.

One has to begin by frankly recognizing that on any particular occasion, perhaps on most occasions on which one is entitled to vote or litigate if one so chooses, the one so entitled may have little or nothing of importance immediately at stake. He may not much care, or have any great reason for caring, who wins the election or whether the referendum question is voted up or down. Similarly, though he may have a winning cause of action, he may not be greatly concerned, or have any reason for being greatly concerned, about receiving the remedy to which he is entitled. In either case, if forced to pay the full marginal cost of exercising the participatory right, a person might well choose to forego it. In fact, this often happens in both modes of participation. People stay away from the polls in droves, especially in bad weather, evidently because they have too little immediately at stake to warrant the inconvenience of going out to vote. People likewise often forbear to sue even when their probabilities of winning are near unity, because victory is not worth the expense (including personal inconvenience). Both as to voting and as to litigating, there are respectable reasons for believing that these economic-deterrence effects are often salutary.[26]

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25. Boddie v. Connecticut, 401 U.S. 371, 374-75 (1971).

26. As for litigating, see note 85 *infra* and accompanying text. As for voting, there is an argument that any device which causes the probability of one's casting a vote to vary with the intensity of one's concern about the issues or candidates, tends to increase the election's net output of aggregate voter satisfaction. *Cf.* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 684-85 (1966) (Harlan, J., dissenting). This argument may be vulnerable to the charge of overlooking the noninstrumental significance of voting—as, for example, a symbolic reaffirmation of membership in the community—but it is, even so, both a plausible and respectable view.

Yet the general anticipation of one's being free to participate (vote or litigate) when one wants or needs to do so seems tremendously significant, wholly apart from whether such a want or need ever actually materializes and motivates a person to vote or sue. This anticipation matters both on account of its deterrent effects on the behavior of those who must contemplate being voted on or sued, and on account of its effects on the potential participant's own understanding of society and of his or her place in it. As to voting, the point hardly requires elaboration. The low voter turnouts which regularly bring cries of consternation and exclamations of fear for the health of "our democratic system" plainly must reflect (at least in part) the effectiveness of people's *potential* vote. If politicians' anticipation that people will vote when they feel the need causes the politicians to act in such a way as to minimize people's feelings of needing to vote, then in many instances people will not vote because, as it turns out, they don't need to. In this light, a person's failure to vote, or his readiness to admit on the occasion of any particular election that he doesn't much care if he votes today or not, is no evidence at all that his right to vote in general is not important to him. Quite possibly he has been participating—making his will count—all along by letting it be supposed that he will vote if pushed to it.

Cannot much the same thing be said of one's right to litigate in general? We are, it may be said, a juridical society. I say a juridical society, not a fractious or litigious one (though by some lights the latter adjectives, too, may be thought applicable). To a notable degree the panorama of our public life and human interaction occurs against a backdrop of supposed, even if vaguely comprehended, legal rights, entitlements, and protections—all potentially realizable through litigation, but all meaningful also simply by virtue of their inchoate public recognition, quite apart from whatever explicit litigation threat may develop. This jural backdrop must surely exert a deep and pervasive influence not only on our dealings with one another but on our very attitudes towards one another.[27] Some dim awareness that courts are available as a last resort to protect one's entitlements, including, to some extent, one's claims to fair and just treatment, must certainly, in our society in its present stage of evolution, make a significant contribution to whatever sense of security people feel in entering into relationships with others—relationships often involving personal exposure or dependency of one sort or another. This means that for the exceptional person for whom the courts promise or turn out to be effectively

27. *See* Abram, *Access to the Judicial Process*, 6 GA. L. REV. 247 (1972).

inaccessible, the sense of security—and with it self-respect—may be significantly undetermined. On the other hand, suspicion that certain others cannot count upon effective juridical access can hardly help biasing the shape of transactions, relationships, and attitudes that arise between oneself and those others. And what of the influence of the jural backdrop on legislative activity? Who doubts that the legislature, when it considers what general rules or entitlements should prevail in some sector of human affairs, tends to proceed on the comforting assumption that the courts, fully armed not only with whatever rule or entitlement the legislature may promulgate but also with the traditions and principles of common law and equity, are there if needed to prevent unanticipated injustice? Insofar as that assumption is untrue for any person, is that person not being exploited by the legislative process? Indeed, do not all these considerations fairly add up to a conclusion that any person who cannot rest assured that in situations of legal stress he or she will have effective access to the juridical system is to that extent excluded from the circle of citizens, much as a person would be excluded by denial of the franchise?[28]

To be effective, anticipation must be credible. If a right to participate in general is vitally important because of what results from the general anticipation of it, then there is need for caution about refusing to honor the right on particular occasions of its attempted exercise because the costs of that particular exercise don't seem to be worth the immediate stakes. This is obvious to all in the case of voting, and it seems no less true in the case of litigating. Moreover, as to both voting and litigating it can be argued that the risk of being excluded on a particular occasion by functional indigency—inability to pay even a scaled-down fee in a partially subsidized system—is a risk that may not fairly be imposed. Insofar as the anticipatory importance of participation pertains to deterrence, the argument would have to be that an entire, distinguishable interest group (people with little wealth and low incomes) will thus be excluded with resulting skewing of the incentive system away from the degree of concern for their interests that is due them. And insofar as the anticipatory importance of participation lies in its meaning for the self-image of the potential participant, the argument is that the impecunious person, having to contem-

28. *See* Abram, *supra* note 27, at 251: "[T]he question whether access to the courts will be facilitated by removal of financial barriers . . . is important to potential litigants because it tells them whether they will have equal access to this 'more rational' source of power. It tells them, in short, whether the society in which they live will allow them to enjoy this fundamental component of civilization. It tells them whether they will be fully enfranchised citizens."

plate not just one but an indefinite series of exclusions, would suffer just the injuries which his participatory right is supposed to avoid.

However persuasive one may find these arguments, they seem about as persuasive when applied to litigation as when applied to voting. And that is enough to establish the analogy between voting and litigating required for the constitutional-law argument I am trying to build—that insofar as metatextual considerations argue for consecration of general voting rights in a special status of constitutional protection against frustration by access fees,[29] such considerations argue as strongly for a like conclusion about general litigation rights. For this purpose, it matters not whether the special constitutional status is called a part of "due process liberty" or of the "substantive" aspect of equal protection of the laws.

It should be clear that my argument comparing access to the courts through litigation with access to the legislatures through voting does not rest on the theory that judicial decisions are "really" just legislation from another source; nor is the argument's reach limited to "law reform" cases in which the differences between adjudication and legislation are least distinct. The argument treats litigation and legislation as distinct processes, but as bound up with one another in an entire, political-legal order in which the court's part is no less critical than the legislature's—and no less critical where the rights for which vindication is sought are of the plainest, best-established sort than where they are of phenomenal social significance or are still straining for judicial recognition. The Supreme Court has signified its agreement through its decisions treating voluntary association for litigation purposes as an exercise of first amendment rights: That view holds whether the aim of the litigation be the overthrow of Jim Crow[30] or the recovery of damages for personal injury.[31]

It would, conversely, be a mistake to think that constitutional protection for court access is limited to cases in which persons seek judicial effectuation of established or conceded rights under existing legal interpretations, and does not extend to quests for "law reform."[32]

29. *See* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 667-68 (1966); *cf.* Lubin v. Panish, 94 S. Ct. 1315 (1974); Bullock v. Carter, 405 U.S. 134 (1972).

30. *See* NAACP v. Button, 371 U.S. 415 (1963).

31. *See* UMW, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia *ex rel.* Virginia State Bar, 377 U.S. 1 (1964); Brickman, *Of Arterial Passageways Through the Legal Process: The Right of Universal Access to Courts and Lawyering Services*, 48 N.Y.U.L. REV. 595 (1973); *cf.* Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253, 282-83 (1968).

32. *See generally* Hazard, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699 (1969).

Judicial decisions that might loosely be classed as "law reform" are of course not that in strict formalistic theory,[33] but rather are the vindication of positively established rights. If, for example, a suit is successfully brought to correct the diversion of certain grant-in-aid funds from congressionally specified beneficiary groups,[34] the effect on administrative practice may *resemble* that of a change in law; administrators, required for the first time to obey the law, and to conform their own regulations to it, may *feel* as though the law has been "changed"; but they are simply mistaken in that feeling.

Obviously this point can be escalated one step, to the level where statutory law is tested against the Constitution. In what sense is it correct to say, for example, that the decision in *Boddie v. Connecticut*[35] is "law reform" rather than simply the securing to Mrs. Boddie and her "classmates" of their established rights under the existing Supreme Law of the land? Some would answer that, in applying the broad mandates of the fourteenth amendment and other constitutional abstractions, the Supreme Court and other courts are in reality making and changing—not simply applying—the law. The metatextual argument, if accepted, excuses us from resolving the theoretical controversy to which that answer leads. For however we wish to characterize the way our courts behave in constitutional cases, that *is* how they do behave. That judicial behavior, whatever it is and whatever we call it, is accessible to a substantial portion of the citizenry—those able to afford the costs. That judicial behavior is part and parcel of our political system as it is found from time to time. Whether that behavior is contained wholly within the juridical sector or spills over into the legislative sector matters not for the force of the proposition that, whatever the political system—the governmental system—*is* at a given moment, all citizens by virtue of their citizenship have a "fundamental interest" in access to it.

We are a juridical society. We are also, to some unutterable extent, a judge-governed society. Access to courts and access to legislatures are claims that merge into one another, to just that same unutterable extent. Law reform and law application are, to that same extent, but different perspectives on one governmental process. You cannot, without confusion, call a person a citizen and at the same time sanc-

33. *I.e.*, the theory according to which courts, as such, have no proper function save to apply the established, general rules of positive law to the specific fact situations before them. *See* Kennedy, *supra* note 7, at 358-59.

34. *E.g.*, Natonabah v. Gallup-McKinely County Bd. of Educ., 355 F. Supp. 716 (D.N.M. 1973).

35. 401 U.S. 371 (1971).

tion the exclusion of that person from that process.[36]

2. *Protection For Court Access Inferred From Procedural Due Process*

In this section I shall not argue that litigation access for civil plaintiffs is directly encompassed within the established strict right of defensive procedural due process which furnished the Court's basic premise in *Boddie* and countless other cases.[37] It is tempting to see in every violation of a legal right, whether by private agents or public officials, a "deprivation" of property or liberty which becomes a violation of the constitutional due process guaranty when the state fails to provide a genuine opportunity to seek requital in the courts;[38] however, this approach is not wholly satisfactory. It undeniably lays some strain on the constitutional text: To say "[n]o state shall deprive any person of liberty or property" is not quite to say "[e]ach state shall effectively vindicate all claims arising out of deprivations by anyone of liberty or property." If, as has been suggested, the requisite "state action" — the state's authorship of a deprivation—is to be located in the legal rules forbidding self-help,[39] the resulting protection against exclusion from court by access fees will not apply in any case where we can conjure up some lawful self-help method that might have worked, be it ever so imprudent or impractical.[40] If, as has also been suggested,

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36. "Both voting and access to the courts are forms of enfranchisement, of participation in the political process." Abram, *supra* note 27, at 259. A like point is made in Wille, *supra* note 9, at 5.

37. Many are cited in *Boddie*, 401 U.S. at 377-78 n.3. A notable post-*Boddie* decision is Fuentes v. Shevin, 407 U.S. 67 (1972). See also Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974).

38. *See* Willging, *supra* note 31, at 287-88.

39. *See* Goodpaster, *supra* note 23, at 251-52.

40. *See Part I* at 1195-96 & n.146. Of course, as the *Kras* opinion reminds us, *see id.* at 1159-60, there is available in virtually every case (divorce is the chief exception) at least one lawful, practicable, and prudent (if erratically effective) method of self-help, namely, appeal to the conscience and good will of your adversary. Professor Goodpaster, *supra* note 23, foreseeing this rejoinder, stipulates that due process rights are violated by legal rules "which require an individual to resort to a court for the protection of an interest or claim *or to go begging.*" *Id.* at 251 (emphasis added). But the question remains: Since the state did not itself commit the injurious act, and since it doesn't prevent the victim from presenting his claim of right to the injurer, how can it be said that the state has committed a deprivation? And what if the state hasn't forbidden all other imaginable forms of self-help? What if the victim was legally privileged but physically unable to withstand the finance company man's repossession of his car? Or could have avoided repossession by keeping the car holed up in a garage? At bottom, the trouble with locating the requisite state action in rules forbidding self-help is that only sometimes—perhaps rarely—are those rules really relevant to the victim's predicament. Often or usually the reason he needs access to the courts

the state action is to be located in the private injurer's having committed the injury while acting in a statelike role or performing a "state function,"[41] the resulting protection against exclusion from court by access fees will apparently apply only to cases in which the injurer was bent upon some remedial self-help project of his own.[42]

But the act of barring access to the courts, by demanding fees from persons unable to pay them, unquestionably belongs to the state;[43] and it is that sort of state action which, I argue, unconstitutionally restricts enjoyment of a constitutionally recognized liberty of litigation access. There is no need to look any further for state action (although, as will be seen, the "state action" qualification on fourteenth amendment guaranties remains a problem for the argument). Nor is there any need to insist that the protected liberty, of which the state deprives a functionally indigent person by demanding the fee, is the same thing as—or is quite contained within—the established, defensive procedural due process right of notice and opportunity to be heard. It will be enough to show that the substantive right of access is so closely related to the strict right of defense, is so clearly suggested by the evident purpose of the strict defensive right, as to partake of constitutional protection through the "fundamental interest" conception given its most recent formulation in *Rodriguez*.[44]

a. *The Currently Established Broad Meaning of Defensive Procedural Due Process*

We can divide the disputable elements in a civil action into the three categories of injury, justification, and cause. Let us define "jus-

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is not that the state is forbidding him to use some alternative, self-help recourse which would serve him just as well; but rather that there is not and never has been any alternative recourse, which as a matter of fact would have been effective, practicable, prudent, and reasonable to expect him to take. (Insofar as that is not true, there may well be a substantive defense to his claim, on the order of contributory negligence, assumption of the risk, "coming to the nuisance," failure to mitigate damages, or some other manifestation of the "rule of avoidable consequences.")

41. *See* Clark & Landers, Sniadach, Fuentes *and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355, 377-79 (1973).

42. The statement in the text is amplified in the Appendix, see text accompanying notes 118-19 *infra*. Various other theories of "state action" in the context of self-help repossession by secured creditors are advanced by Clark & Landers, *supra* note 41. *See also* McDonnell, Sniadach, *The* Replevin Cases, *and Self-Help Repossession—Due Process Tokenism?*, 14 B.C. IND. & COM. L. REV. 437 (1973). Opposing arguments are marshalled in Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003 (Parts I & II); 47 S. CAL. L. REV. 1 (1973) (Part III).

43. *See* Goodpaster, *supra* note 23, at 251; *cf.* Comment, *supra* note 8, at 588.

44. See notes 14-20 *supra* and accompanying text.

tification" to mean an objectively verifiable explanation or account of a person's conduct or the circumstances attending it, where under an applicable rule of law some explanation of that sort would absolve that conduct of legally wrongful quality despite its having caused harm to another. Examples of justifications are: "My conduct was consistent with my promises"; "my conduct was consistent with all pertinent regulatory laws"; "my conduct was reasonable under the circumstances."

Now let us say that a person, *P*, sustains a "legally cognizable injury" whenever the conduct of another person, *D*, causes an unwelcome impact upon *P*, and under the applicable legal rules *D* who causes such an impact by such conduct becomes subject to a demand by *P* for justification; which is to say that *D* is not legally free, at least without compensating *P* for his losses, to cause such an impact by such conduct at his completely unrestricted discretion.[45] A term closely related to legally cognizable injury is "entitlement," where entitlement refers to any treatment which the applicable law says *P* is (or is not) to receive from *D* unless a justification exists. An entitlement is treatment which *D* may not lawfully withhold from (or impose upon) *P* at *D*'s completely unrestricted discretion. Legally cognizable injury, then, is the exact equivalent of denial or violation of an entitlement.[46]

Finally, let us use the phrase "cause" or "legal cause" to signify that sort of factual, causal connection between *P's* harm and *D*'s conduct which will render *D* legally liable for the harm if it is a legally cognizable injury and *D*'s conduct is not justified.[47] To illustrate: A

45. I intend no implication that *D* will always, or usually, be assigned burdens of proof on justification issues.

It should be noted that my definitions confine the justification category to questions about whether *D*'s conduct violated a legal norm—leaving to the legal injury category questions about whether *P*'s injury was "within the risk" contemplated by any norm which *D*'s conduct did violate or whether the violated norm defined a "duty" which *D* owed to *P*. This sort of question is not easily assigned to one or the other category. It might well be thought a part of justification for *D* to contend that the legal order does not mean to include liability for a given sort of injury to a given sort of *P* (or liability to injunctions at the behest of such *P*'s sustaining such injuries) among the sanctions faced by agents who must shape their conduct in contemplation of legal norms. My reason for assigning the "risk" or "duty" question to the category of injury rather than justification is a rhetorical one explained in note 52 *infra*.

46. Entitlements thus are not "absolute" claims which override all possible justifications, but rather claims triggering demands for some sort of justification. This usage, which may strike some readers as artificial, is adopted because it corresponds with the Supreme Court's usage in conceptualizing procedural due process rights. See note 52 *infra* and accompanying text.

47. These are all, to be sure, question-begging definitions. But the questions they

person suffering bodily harm from the conduct of another has undoubtedly sustained a legally cognizable injury, although on many occasions justification will be rather easy (*e.g.*, the harm was unintended and the conduct prudent). A person gazed at on the street, or refused private charity, has certainly not sustained a legally cognizable injury. A person denied public employment has sustained no such injury by virtue of the refusal *simpliciter*.[48] Yet one may have a legally protected claim not to be denied public employment in violation of a special contract, express or implied,[49] or in violation of legally established procedures;[50] one may also have legally protected claims not to be denied employment for certain illicit reasons—for example, that one is of Ukrainian extraction or is a subscriber to *American Opinion*.[51] In these latter cases, it seems less apt to describe the legal injury as denial of employment than as discrimination, punishment of speech and association, or violation of reliance upon, and expectations regarding, promises and procedural regularity.

Our definitions can now be used to state what seems to be the currently accepted meaning of defensive procedural due process: whenever state officials by their conduct cause a legally cognizable injury to any person—or, in other words, violate any of that person's entitlements—that person may demand that the officials submit the question of justification to binding appraisal by an impartial officer in a proceeding in which the injured person has had a fair opportunity to participate.[52]

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beg—those regarding the actual or ideal content of the legal rules—do not immediately concern us.

Again, I can see no clear reason of principle why "risk"/"duty" questions might not be assigned to the legal cause category just as well as to the injury category. *See generally* R. KEETON, LEGAL CAUSE IN THE LAW OF TORTS (1963). The choice is strictly a matter of expository convenience. It has no critical bearing on the argument I am making.

48. *See* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).

49. *See* Perry v. Sindermann, 408 U.S. 593 (1972).

50. *Cf.* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 YALE L.J. 425, 463 (1974).

51. *See* Arnett v. Kennedy, 92 S. Ct. 1633 (1974); Perry v. Sindermann, 408 U.S. 593, 597-98 (1972); Pickering v. Board of Educ., 391 U.S. 563 (1968).

52. *See* Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972) (dictum); Fuentes v. Shevin, 407 U.S. 67 (1972). The theory underlying these three decisions seems to be: Any officially authored deprivation of liberty or property triggers the defensive rights of procedural due process. "Liberty" encompasses a number of interests which, by virtue of legal protection accorded by the Constitution itself, officials may not violate at their unfettered discretion—or, in other words, without justification. "Property" encompasses any other interests ("entitlements") which, by virtue of legal protection accorded by statute, common law, or special contract sanctioned by statute or common law, officials may not violate at discretion and without justification. A majority of the Supreme Court has

That statement, which may seem innocent enough at first acquaintance, has a number of important and perhaps surprising implications which can be brought out by considering a series of possible cases.

Case A: A state official inflicts legally cognizable injury at the behest of a private person, and cites as justification a remedial claim pertaining to that private person.[53] Under *Fuentes v. Shevin*,[54] this triggers defensive procedural due process (DPDP) rights.

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recently confirmed this reading of the decisions. *See* Arnett v. Kennedy, 92 S. Ct. 1633, 1670 (1974) (Marshall, J., dissenting, joined by Douglas and Brennan, JJ.); *id.* at 1650 (opinion of Powell, J., joined by Blackmun, J.) ("While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without [providing a constitutionally required minimum of] appropriate procedural safeguards."); *id.* at 1660 (White, J., dissenting) ("While the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition.").

It can now be seen why I have chosen to assign "risk" or "duty" questions to the injury rather than the justification category. Injury—denial of "entitlement"—is a threshold issue in the procedural due process model. Only upon its appearing that officials have acted so as to subject themselves to a demand for justification can there arise a question of due process obligations. Assigning the "risk" or "duty" question to justification would have lowered the due process threshold and made my restatement of the current doctrine less modest and more controversial than it now is. But the choice is merely rhetorical. In the final analysis, it makes no difference. See text accompanying notes 64-65 *infra*.

One might wonder whether "standing" doctrine requires qualification of the proposition that due process entails a right on the part of one who has sustained a legally cognizable injury to demand justification from an official who has legally caused that injury. But it is strongly arguable that pre-trial dismissals explained on "standing" grounds must always rest either on a judicial determination that the plaintiff has sustained no legally cognizable injury, or else on judicial acceptance of some substantive justification advanced by the official. *See* Albert, *supra* note 50, at 425, 427-42, 464-68, 493-97.

Standing doctrine may, however, have a quite different effect which should be noted: It may allow some lawsuits to be maintained by persons who have sustained no relevant legally coguizable injury. *See id.* at 468-76. It seems that insofar as the argument against exclusionary access fees rests on analogy between the proposed right of litigation access and the established defensive right of procedural due process, it would not apply to litigation asserting *only* the rights of others or of the public. But drawing such a line may be exceedingly impractical. *Compare Part I* at 1211-15. Moreover, the argument based on analogy between litigation and voting, see notes 21-36 *supra* and accompanying text, seems to apply with full force to "third-party" and "public interest" claims.

53. By a "remedial" claim or action I mean one designed to correct or resolve some inequity previously introduced into the relationship between agent and victim. Further development of this analysis can be found in the Appendix, see note 117 and text accompanying notes 117-19 *infra*.

54. 407 U.S. 67 (1972). Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974), has not disturbed this part of the *Fuentes* holding.

Case B: The official acts on behalf of the state itself, claiming a remedial justification pertaining to the state, and his action is an "affirmative" one such as a seizure of property, one which alters a *status quo* so as to restore a (claimed) previous equitable position. The applicability of DPDP follows *a fortiori* from *Fuentes*, inasmuch as state action is even more clearly involved.

Case C: This resembles *Case B* except that, instead of acting affirmatively, the official withholds some demanded performance, refusing to disturb an existing situation on purportedly remedial grounds. Suppose, for example, that the official refuses a money payment assertedly due under a contract for services, on grounds of material breach or set-off of damages for breach. Has the official violated DPDP rights by failing to set up a fair hearing prior to the ostensible due date? One might want to avoid this question by noting that the citizen's civil action to enforce the contract fulfills all the purposes of the DPDP fair hearing.[55] But a knotty theoretical problem remains. What if there has been no waiver of sovereign immunity to contract actions, no Tucker Act[56] or analogous state legislation? This question can be handled in the following way: Given the constitutional right of DPDP as propounded in the *Fuentes*, *Roth*, and *Sindermann* cases, either (i) allowance in such a case of a sovereign-immunity defense would have to be conceived as a matter of "substantive" law— would have to be a way of saying that enforcement of this promise by a state official is not legally available even though an analogous private promise would have been enforceable as a matter of general, private law[57]— or else (ii) if the defense is conceived as a challenge to the court's competence, as distinguished from a denial of substantive liability, then allowing the defense will violate DPDP rights unless the official can point to some other forum in which a judicial or

55. That is, it fulfills all the purposes which can now be achieved by a judicial determination that the failure to grant a prior hearing was wrongful. Judicial relief *now* does differ from receipt of a prior hearing in that payment has been delayed; but a judicious award of interest can minimize that difference.

56. 28 U.S.C. §§ 1346, 1491 (1970).

57. Such a "substantive" conception of official immunity seems to be reflected in Scheuer v. Rhodes, 94 S. Ct. 1638 (1974). *See also* The Western Maid, 257 U.S. 419, 433 (1922) (Holmes, J.): "The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort . . . . Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp." This "positivist" view of sovereign immunity is discussed and questioned in P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1343-44 (rev. ed. 1973).

quasi-judicial fair hearing is available.[58] A substantive rule withholding all the sanctions of contract law from promises made by officials on the state's behalf would not contradict the DPDP rule that insofar as legal entitlements *do* exist vis-à-vis officials and the state, some adequate judicial or quasi-judicial tribunal must be available for vindicating those entitlements. Under the DPDP rule, the citizen is entitled to an adjudication of his claim in some reasonably accessible tribunal—although that adjudication may go off on a "substantive" conclusion of no liability because of "sovereign immunity."[59] A sovereign immunity defense, which totally excludes a fair hearing on the question of justification, once a legally cognizable injury is asserted, cannot be reconciled with the DPDP rule. Indeed I shall argue below that it might be a concern with just such special claims of sovereign or official nonaccountability which would explain why the constitutional guaranty of

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58. The adequacy of the hearing opportunity would always be subject to judicial review. *Cf.* Comment, *supra* note 8, at 580. Thus in cases such as Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), and Malone v. Bowdoin, 369 U.S. 643 (1962), where government officers successfully resisted claims for specific relief on sovereign immunity grounds, it may have been crucially important that the plaintiffs had available to them the alternative recourse, under the Tucker Act, of suing for damages for breach of contract or a "taking" of their property. *See id.* at 647 & n.8; 337 U.S. at 703-04 & n.27; 28 U.S.C. §§ 1346(a), 1491 (1970); *cf.* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 208 (1965):

> While the Privy Council sought some of the advantages of sovereign immunity in insisting on separate [internal] organs for administrative review, its objective was not immunity [denial of hearing] as such—remedies for grievances were still available—but escape from control of another governmental body [the courts]. If this was immunity, it was only such in degree, perhaps comparable to Bacon's insistence on Chancery as a more suitable court for the King than were the ordinary common law courts.

But what do we say when the aggrieved citizen in a case like *Larson* or *Malone* claims a legally protected interest in regaining or retaining possession of the specific assets in dispute (relief not available under the Tucker Act)—perhaps on the ground that there is no "public purpose" to support a "taking" of this property by these officers? From the *Larson* opinion (337 U.S. at 690), it appears that sovereign immunity would not prevent adjudication of this claim. Moreover, I cannot see why the logic of *Fuentes* and *Sindermann* would not augur success should the citizen in this case sue under 28 U.S.C. § 1331 (1970), to restrain the violation of his procedural due process rights which occurs when government officers occupy his property without allowing him to be heard on the "public purpose" question. (I do not, by that statement, mean to have addressed the immense problem of what happens if less than $10,000 is in controversy.)

59. *See* United States v. Lee, 106 U.S. 196, 210, 215-16, 219-20 (1882) (mere assertion of "substantive" sovereign immunity defense does not foreclose judicial jurisdiction to determine the merits of that defense). If the defense claimed is that the government has provided another tribunal with exclusive jurisdiction to try claims against the government or its officers, the court should adjudicate *that* defense on the merits—meaning, particularly, that the court should determine whether the alternative tribunal's formats and procedures meet the standards of procedural due process.

DPDP is written in terms limiting the guaranty's application to deprivations by states.[60]

Case D: The state official invokes a nonremedial justification, while admitting that his action was a legal cause of violation of a legally protected interest. For example, the official has destroyed goods in the citizen's possession on the ground that otherwise they would have fallen into the hands of an enemy power. Although a theoretical argument can be presented which might limit DPDP rights to contexts of remedial justification,[61] it seems most unlikely that a contemporary court or commentator would seriously try to differentiate cases of remedially motivated official action from other cases of officially designed harm to legally protected interests, for DPDP purposes.[62]

Case E: The state official, while admitting that his conduct caused violation of a legally protected interest, further says that he has no justification at all—that he has purported to make no judgment whatsoever about the circumstances, traits, past behavior, or deserts of the adversely affected citizen, that therefore there was no occasion for any "fair hearing" (since there would have been nothing at issue in such a hearing) and consequently there can have been no violation of a right of DPDP. The absurdity of the official's claim seems immediately apparent, though we may experience some difficulty in articulating why we find it absurd. Perhaps it is enough to suggest that this case is just the extreme or limiting example of a case in which the official claims a remedial or nonremedial justification and the claimed justification turns out to fail on the merits.[63]

Case F: The official, admitting that his conduct caused legally cognizable injury to the citizen, says that the conduct (if wrongful at all) was negligent rather than intentional, that therefore there was no occasion for a prior fair hearing, etc., etc. But the citizen is now demanding performance of some remedial obligation—an obligation based on operation of law—and why doesn't the official's refusal to perform that obligation itself create an occasion for a fair hearing? If the official claims that his official status screens him from liability based on his negligence, we are back to *Case C*: either that is a defense on the merits as to which the citizen has a DPDP right to an adjudication,

60. See notes 80-81 *infra* and accompanying text.

61. See Appendix, note 117 and text accompanying notes 117-19 *infra.*

62. *See* Perry v. Sindermann, 408 U.S. 593 (1972); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886 (1961).

63. *Compare* Screws v. United States, 325 U.S. 91 (1945).

or it is a jurisdictional defense and as such is overcome by the constitutional guaranty of DPDP unless a fair hearing is available elsewhere.

Case G: The official denies that he has done anything which caused legally cognizable injury to the citizen: by this he means either that the citizen has in fact sustained no harm; or that any harm which the citizen has sustained was not "within the risk" contemplated by any legal rule restricting the official's discretion—*i.e.*, that there is no relevant rule intended to protect that sort of citizen against that sort of harm; or that his (the official's) conduct was not a legal cause of harm to the citizen. For any or all of these reasons, says the official, there is no basis for a justification demand and so no occasion for a fair hearing. The discussion of *Case F* suggests why, despite these contentions, the citizen is entitled by DPDP to a fair hearing on the issues, raised by the official, of harm in fact, "risk" or "duty," or legal cause.

The key to the argument is that procedural due process is *itself* an entitlement established by the Constitution—a "master" or "second order" entitlement—an entitlement that officials shall submit to judicial or quasi-judicial review of their questioned conduct. Like entitlements generally, this one is not an absolute claim, but it is a claim which may not lawfully be refused without justification. Officials are not legally free, at their unrestricted discretion, to refuse review. The conduct of refusing review itself causes a legally cognizable injury, triggering a demand for justification. Here justification includes such assertions as: The person seeking review has suffered no harm, or no harm against which any relevant legal rule was meant to give protection, or no harm which was legally caused by the questioned conduct. Any or all of these justifications may be true, but their truth is not established by their mere assertion. Like justifications generally, their truth is a mater for adjudication or quasi-adjudication at the behest of the citizen asserting the due process entitlement. The citizen thus can be seen as pressing his demand in two stages: in the first stage, he demands justification for refusal of a second-stage hearing on his underlying demand for justification of the specific, official conduct which, he says, caused a legally cognizable injury to him. If, but only if, it is determined that there is no justification for refusing the first-stage demand, the second-stage hearing ensues. Of course, because the issues of injury, risk, duty, cause, and justification may be closely intertwined and indeed inseparable,[64] the two stages may in practice collapse into one proceeding. For my purposes the essential

64. See notes 45, 47 *supra*.

point is that *a* proceeding there must be, if the citizen demands it; and second-stage relief must be forthcoming unless either a first-stage or a second-stage justification for refusal is established.[65]

b. *The Private Civil Action as a (Quasi) Due Process "Fair Hearing"*

I have conceded from the beginning that the state does not commit a constitutionally forbidden deprivation when a private agent unjustifiably violates an entitlement—commits a tort, breach of contract, breach of trust, or whatever. But I insist, too, that it can only be this "state action" gap, and nothing else, which separates the fair-hearing rights of private civil plaintiffs from those of persons, including civil defendants generally, whose entitlements are violated or threatened with violation by state officials.

The effect of dispensing with the state action qualification would be that violation by *anyone* of a legal entitlement, coupled with denial of a fair-hearing opportunity, would also violate the constitutional due process right; from which it would follow that *every* civil action would be either (i) itself the "fair hearing" constitutionally owed to the victim, or (ii) judicial review of a previous, quasi-judicial fair hearing, or (iii) barred by former adjudication. In short, every *nisi prius* civil action, unless it constitutes an attempt to relitigate a claim, is a method of vindicating quasi-due process rights—due process rights which would prevail but for the textual "state action" qualification on such rights.

Suppose that the "state action" qualification on DPDP rights has been swept away—so that the clause, in effect, reads: "No person, shall deprive another person of life, liberty, or property without due process of law." Now imagine that a person suffering legally cognizable injury and wishing to pursue the claim through litigation, but finding the ordinary courts for some reason inaccessible,[66] adopts the following tactic: He initiates a "civil rights" action (as I shall call it) claiming an

65. Readers may notice a resemblance between what I have called first-stage justifications—no harm in fact, no harm within the scope of intended legal protection, no adequate causal relationship between harm and questioned conduct—and the issues traditionally examined under the heading of "standing" to question administrative action. It has never been doubted that "standing" is a question upon which the citizen seeking review is entitled to adjudication; and the inseparability of "standing" issues from "merits" issues—of first-order from second-order justifications—is powerfully demonstrated by Albert, *supra* note 50.

66. The barrier might be an access fee. Or, imaginably, it might be some combination of rules regarding subject-matter jurisdiction, venue, and service of process making it impossible to find any tribunal competent to handle a particular case.

unconstitutional deprivation of liberty or property without due process, rather than basing a claim for relief directly on the substantive law allegedly protecting his violated interest.[67] If the defendant cannot truthfully deny that his conduct violated an entitlement of the plaintiff (and there has as yet been no fair hearing and no fair hearing is available elsewhere), the defendant's only course is to admit the due process violation while denying any violation of substantive rights and counter-claiming for relief identical to that to which he has already (as it were) helped himself. The typical result would be adjudication of whether the defendant's action was legally justified under the applicable substantive law, accompanied by appropriate restoration or compensation to the plaintiff if, but only if, the decision on the merits goes against the defendant.

Suppose, for example, that the plaintiff's substantive complaint against the defendant is that the latter has maintained an actionable nuisance for the preceding two months, causing both a medical injury to the plaintiff's person and a continuing impairment of use and enjoyment of the plaintiff's land. Having had no prior hearing, the plaintiff charges a due process violation. He asks for money damages for both types of injury, as well as an injunction against continuation of the alleged nuisance. The defendant admits, denies, and counterclaims as indicated above. If the court determines that the defendant has done and is doing nothing which is a legal cause of legally cognizable injury to the plaintiff, then it enters judgment for the defendant because no fair-hearing duty ever arose. Otherwise, without yet reaching the question of whether the defendant's activity was legally justified, the court addresses itself to the question whether the defendant has ever afforded a fair-hearing opportunity to the plaintiff. If the answer is "no," the court concludes: (a) as to the *future*, the defendant should be enjoined until such time as he initiates and prevails in a fair hearing; but since the defendant's counterclaim is, in effect, a request to make this very action into the requisite fair hearing, the court will now decide the question of legal justification for the defendant's conduct and grant or deny the injunction accordingly;[68] (b) as to the

67. I simply assume that there exists some accessible court which is competent to adjudicate the federal constitutional claim. There may well be a state court with the requisite competence. As presently written, 28 U.S.C. § 1343(3) (1970) might not cover this "civil rights" claim (Who has committed a violation or deprivation "under color of state law"?), so that the only statutory basis of federal district court jurisdiction would be 28 U.S.C. § 1331 (1970) with its requirement that $10,000 be in controversy.

68. Again, I merely assume that the tribunal is competent to adjudicate this counterclaim for declaratory relief, perhaps through pendent or ancillary jurisdiction.

past, the defendant has violated the plaintiff's due process rights by causing him legally cognizable harm without first having set up a fair-hearing opportunity, and the defendant should be required to compensate the plaintiff for that due process violation. But (the defendant should contend) the due process violation is a legal cause of only those losses which would have been avoided by the defendant's timely performance of his fair-hearing duty. This excludes losses caused by activity which would have been held legally justified at a fair hearing had one been held, and requires the court in this retrospective portion of the "civil rights" action to adjudicate the question of legal justification in order to determine the existence and extent of the defendant's liability in damages.[69]

Thus the net result of the plaintiff's "civil rights" action closely coincides with what the plaintiff could have achieved simply by alleging his ordinary substantive claim in an ordinary court, had one been accessible. In other words, ordinary civil actions are a method of vindicating quasi-due process rights, at least in cases in which defendants admit having acted in a way which violated an entitlement. But what of cases in which the defendant says that no entitlement was ever violated, or that no conduct of his was a legal cause of any such violation? Of course, the defendant's merely *saying* this would not suffice to establish that the plaintiff's quasi-due process rights were not at stake; that would be established only by an adjudication upholding the

69. *But cf.* Horton v. Orange County Bd. of Educ., 464 F.2d 536 (4th Cir. 1972). In regard to the "continuing" harm to use and enjoyment of the plaintiff's land, the defendant might want to point out that once the harm-causing activity became apparent to the plaintiff, the plaintiff could have filed one of these "civil rights" actions alleging unconstitutional deprivation without due process (the plaintiff couldn't have filed an ordinary civil action, under our assumption that ordinary courts are inaccessible). From that point on (the defendant would continue) a fair hearing was available to the plaintiff, and, therefore, the defendant has violated fair-hearing duties only as to the first, visible instant of the harmful activity. The plaintiff's rejoinder is that with each passing instant of continuation of the harm, the defendant has, in effect, decided anew to harm the plaintiff and so has repeatedly violated the fair-hearing duty.

In regard to the traumatic harm, the defendant might want to claim (if the evidence is supportive) that this was neither intended, nor foreseen, nor reasonably foreseeable; and that he cannot, therefore, be charged with violation of a fair-hearing duty by failure to seek a judicial declaration of rights before the injury occurred. The plaintiff's rejoinder is standard procedural due process fare, and logically irrefutable: if the circumstances make it unreasonable or inapposite to demand a *prior* fair hearing, a *subsequent* fair hearing looking toward restoration or compensation is required instead. *See, e.g.*, Phillips v. Commissioner, 283 U.S. 589, 595-97 (1931); *cf.* Arnett v. Kennedy, 92 S. Ct. 1633, 1656 (1974) (White, J., concurring in part and dissenting in part): "Where the Court has rejected the need for a hearing prior to the initial 'taking,' a principal rationale has been that a hearing would be provided before the taking became final."

defendant's assertion. It is a fair hearing on the justification for the defendant's denial of liability to submit to a hearing which the plaintiff is now, in effect, demanding—and which his ordinary civil action will supply.[70]

Now I want to enter a *caveat* and disclaimer: Taken by itself, the argument of this section might seem bent upon a conclusion that a genuine duty reposes on each person never to commit any act which would foreseeably lead to violation of another's entitlements, without first obtaining a judicial declaration that the act would be legally justified. I do not, of course, believe that any such duty exists. The argument in this section proceeds from a deliberately false premise—*i.e.*, that the constitutional fair-hearing duty is charged to all persons rather than only to states—and is not designed to stand by itself. It is, rather, a piece of a larger argument which contends that states—not private defendants—are duty-bound to ensure that anyone claiming to have suffered a legally cognizable injury can receive a fair hearing on his claim.

c. *"State Action"*

Like most other constitutional duties, the duty to provide fair hearings is imposed only on states and their officials, not upon private agents. Such a duty on the part of states could be limited to disputes in which the alleged violators of legal entitlements are state officials, or it could extend to cases in which such violations are charged against private persons. I have already conceded, *arguendo*, that the more limited reading is the easier to reconcile with the text of the fourteenth amendment due process clause; and accordingly, that the strict, literal constitutional right to state-provided fair hearings applies only in cases of state-authored substantive deprivations.[71] But the interest in having the state provide fair hearings in cases of privately authored deprivations might nevertheless be a "fundamental" or "constitutionally protected" one.[72] In support of just that conclusion, I propose to show that (i) in terms of the purposes served and the interests affected by the state's fair-hearing duty, there is no persuasive explanation of why that duty should be limited to cases of deprivations by state officials; and (ii) the most satisfying explanation of the amendment's use of the phrase "No state" rather than "No person" in regard to its procedural

70. Compare *Case G*, at text accompanying notes 64-65 *supra*.

71. See text accompanying note 38 *supra*. The textual issue might look different in regard to the fifth amendment because of the latter's use of passive voice. But it hardly seems worthwhile here to question the conventional assumption that fifth amendment guaranties are conditioned on a "governmental action" requirement precisely analogous to that of the fourteenth amendment.

72. See notes 14-20, 43-44 *supra* and accompanying text.

due process guaranty is that the framers simply assumed the availability of fair hearings when deprivations were charged against private persons.[73]

How could one explain a constitutional text which, while broadly requiring the state to provide fair hearings upon claims of violations of legally protected interests of all sorts, limits the guaranty to cases in which *state officials* are charged with the violations? Why would our entitlements vis-à-vis *state officials* be given this special concern?

There comes to mind the possibility of an explanation paralleling one which has been suggested for the state-action qualification on constitutional rights such as those to equal treatment regardless of race and freedom of speech and association: to recognize such rights vis-à-vis other private citizens might be to limit *their* freedom unduly, whereas no such objection can arise to imposition of a duty on someone in his capacity as a public official.[74] Though the burden of staging fair hearings would fall only on the state, and not on any private person, it must be recognized that a fair hearing staged by the state can have onerous consequences for the private adversary, who will have to appear and defend, perhaps at considerable monetary and emotional cost; and these burdens might be analogized to the losses of individual privacy which would be occasioned by allowing free speech or anti-discrimination rights to run against all persons in all circumstances, as a reason why framers might have guaranteed fair-hearing rights against public officials but not against private citizens. That is, one might somehow associate the Constitution's restriction of the fair-hearing guaranty to cases of state-authored deprivations with a recognition that it might be bad for private citizens to have to go about their daily lives under constant apprehension of being sued.

Such a comparison of the fair-hearing guaranty with the free-speech and anti-discrimination guaranties does not withstand close scrutiny. There seem to be two interconnected reasons for differentiating between public officials and private citizens in regard to free speech and anti-discrimination duties: First, while persons acting in their official capacities seem to have no significant interest, or no interest worth protecting, in being allowed to suppress or discriminate in the ways forbidden by the Constitution, the same cannot be said of persons acting as private citizens;[75] second, a constitutional free speech or anti-discrimination guaranty applicable to private as well as

73. This is not a claim about the facts of history, but about the logic of the situation.

74. *See Part I* at 1204-05.

75. *Cf.* Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 100-03 (1967).

governmental action would prevent legislatures and courts from working out suitable accommodations of social equality and free speech values with competing values of privacy and individual autonomy traditionally ascribed to the institution of private ownership.[76] Neither reason seems to justify differentiating between public officials and private citizens when we come to consider a constitutional guaranty of fair hearings. It is hardly self-evident that framers would be more concerned about securing private citizens than public officials against fear of being sued. To be sued as an official may be no less emotionally distressing than to be sued as a private person, and no less fraught with risk of undesired consequences (for example, tarnished reputation or blighted career prospects); and the threat of such suits may be as damaging to boldness and efficiency in the public service as in private enterprise. Moreover, a fair-hearing guaranty broadly applicable to cases of private as well as governmental deprivations would in no way prevent legislatures and courts from giving as much weight as they judge desirable to the social and personal interest in freedom from burdensome fears about being sued. Legislatures and courts can always achieve the desired balances through their definitions of legally cognizable injury and legal cause.[77] Once those definitions are fixed, it is *they* which create zones of legally risky conduct and generate any burdensome apprehensions about becoming subject to suit. Constitutional protection for the fair-hearing rights of persons claiming to have suffered injury from such risky conduct is not a significant additional source of apprehension; such protections merely reduce the likelihood that a person subjected to such apprehension *by the substantive law* will be able to escape liability which the law presumably means to make him apprehensive about. That seems most particularly true of the specific manifestation of constitutional protection for the fair-hearing right for which I am here arguing—protection against denial of hearing by exclusionary access fees.

But how, then, *might* we explain why the constitutional protection for fair-hearing rights is verbally conditioned on violations of entitlements by state officials? The most satisfactory rationalization I can think of is simply that framers would not worry about the problem except in regard to claims against public officials. They would naturally assume that in all other cases recourse could be had through judicial or quasi-judicial forums spontaneously provided by the state itself.[78] In fact, the supposed availability of such recourse seems to be

76. *See* Peterson v. City of Greenville, 373 U.S. 244, 250 (1963) (Harlan, J., concurring); *Part I* at 1204-05.

77. See notes 45-47 *supra* and accompanying text.

78. In the Civil Rights Cases, 109 U.S. 3, 17, 24 (1883), the Supreme Court justi-

most or all of what it means, in our legal culture, to say that a legally cognizable injury has occurred.[79] But perhaps framers could remain apprehensive that state officials on occasion would, perhaps even with legislative authorization, act in contradiction of extant legal (including constitutional) entitlements while refusing to submit to judicial or quasi-judicial review of their actions.[80] The constitutional guaranty of procedural due process, then, can perhaps be rationalized as a response to the spectre of totally exclusionary "jurisdictional" invocations of official immunity; and that would explain why the guaranty is written with specific reference to deprivations by the state.[81]

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fied its limiting construction of the fourteenth amendment's due process and equal protection guaranties by reference to just such au assumption:

> [The Negroes' legal] rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress . . . . [These rights are] properly cognizable by the laws of the State, and presumably subject to redress by those laws . . . .

Compare Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3, 16-17 (1961).

79. Compare note 57 *supra* and text accompanying notes 6-7, *supra*.

80. *Compare* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), where the government contended that the fourth amendment merely limited the extent to which federal agents could defeud against a state law tort suit by asserting that their actions constituted a valid exercise of federal power. *Id.* at 390-91. The majority rejected this argument on the ground that the fourth amendment proscribes a broader range of action than simply such conduct as would be actionable under state law. *See also* Monroe v. Pape, 365 U.S. 167, 194-95 (1961) (Harlan, J., concurring).

81. See notes 56-60 *supra* and accompanying text. *Cf.* Dunham, *Due Process and Commercial Law*, 1972 SUP. CT. REV. 135, 150-52; Albert, *supra* note 50, at 444: "[A] private citizen does not commit a trespass if he demands and is granted admission to one's home, since the homeowner may lock the door or call the police. This immunity, however, cannot be extended to consent extracted by a police officer in this manner."

The argument can be illustrated by the case of repossession of chattel security from a supposedly defaulting conditional veudee. The vendee's continued possession of the chattel is "property"—an "entitlement"—in the DPDP sense that under the local substantive law it would be a legal wrong to the vendee for anyone to intrude upon his possession unless there exists some objectively verifiable justification such as default. See text accompanying notes 53-54 *supra*. Under Fuentes v. Shevin, 407 U.S. 67 (1972), if state officers seize the security without granting a fair-hearing opportunity, they thereby violate the DPDP guaranty irrespective of whether there has actually been a default. See also Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974). Granting *arguendo* that a private creditor's self-help seizure, *sans* hearing, would not violate the DPDP guaranty, what reason can we give to explain the discrepancy?

To say that a debtor's continued possession is DPDP-protected "property"—that unjustified interference is a legal wrong under local law—is virtually to say that debtors can obtain redress against unjustified private seizures in some state tribunal, so that a constitutional fair-hearing guaranty would seem redundant. But there is no such appearance of redundancy in the case of seizure by state officials: were it not for the DPDP guaranty, one could easily imagine that state officials might be declared immune from having to justify their entitlement-violating acts in any state tribunal. (Congress

It seems that only by assuming the availability of state judicial or quasi-judicial forums, unencumbered by notions of official immunity, to provide fair hearings of legal grievances against private parties, can one explain a constitutional fair-hearing guaranty limited to grievances against officials. There just is no other satisfying explanation for the state action qualification on a procedural due process guaranty having the otherwise expansive application confirmed by the *Fuentes* and *Sindermann* cases. The ends pursued by procedural due process are, then, at stake whenever the state would totally deny a fair hearing to a citizen alleging a "good" cause of action. The plaintiff's access to such a hearing is, therefore, if not a part of procedural due process itself, a "preferred freedom" or "fundamental interest" con-

did not go that far in section 6 of the Lloyd-La-Follette Act, 5 U.S.C. § 7501 (1970). Had it done so, six justices would have considered such action unconstitutional. See Arnett v. Kennedy, 94 S. Ct. 1633 (1974), discussed in note 52 *supra*.). Could the state maintain an official-immunity scheme against DPDP attack by, for example, "substantively" conditioning all possessory entitlements on the continuing, discretionary tolerance of certain officials, so that seizure by those officials could never violate the entitlement as thus defined and so would never have to be objectively justified, and, accordingly, could never trigger a fair-hearing demand? It seems extremely unlikely that any state would wish to establish such a doctrine as part of its substantive law. Even if some state did so choose, it seems that serious questions would be raised under the "delegation" (as distinguished from the fair-hearing) aspect of the due process guaranty. *See, e.g.*, McGautha v. California, 402 U.S. 183, 270 (1971) (Brennan, J., dissenting).

Such a view of the DPDP guaranty—as directed against state attempts to immunize public officials from having to submit their justifications for entitlement-violating actions to impartial examination in fair hearings—may invite the objection that it fails to explain why due process should sometimes be read, as in *Fuentes*, to impose an affirmative duty upon state officials though not private agents to stage fair hearings *before* they proceed with their encroachments upon legally protected interests. *But see* Mitchell v. W.T. Grant Co., 94 S. Ct. 1895 (1974). Since extension to private entitlement-violators of the affirmative duty to instigate a *prior* hearing would not be merely redundant of what is already implied by the entitlement's existence, perhaps the redundancy notion fails to explain why the DPDP guaranty applies only to deprivations by state officials. But if extension of an affirmative, prior-hearing requirement to private agents would not be precisely redundant, it might very well be either fruitless or intolerable. How could the system hope to enforce an affirmative obligation on the part of all persons to instigate a fair hearing before proceeding to violate any entitlement, except through after-the-fact, retrospective proceedings and remedies, more or less paralleling those which could be obtained in civil actions founded directly on the entitlement-creating local law? (See notes 68-70 *supra* and accompanying text.) Laws purporting to authorize public officials to commit deprivations without prior hearings can be judicially declared invalid; defined classes of public officials can, as found necessary from time to time, be judicially enjoined from thus proceeding; it is even quite possible to fashion general punitive sanctions to prevent public officials from flouting an affirmative, prior-hearing duty. But injunctions cannot issue against the general public; and it is easily understandable that constitutional draftsmen would look with disfavor upon the imposition of an affirmative, prior-hearing duty upon private persons, which could not be effectively enforced otherwise than by exposing us all to the risk of punishment (not merely compensatory sanctions) whenever we violate civil entitlements without having first instigated fair hearings.

tained within substantive due process liberty. That an out-of-court, voluntary settlement may be attainable is of no consequence. Nor does it matter in the least that the interest for which legal protection is claimed "does not rise to the . . . constitutional level."[82]

Speaking with utmost precision, the right of litigation access to which the argument in this section directly points is not, necessarily, a right of access to every judicial forum which would be open to a money-eyed disputant in otherwise similar circumstances—or even of any access at all to a tribunal commonly or formally styled a "court." What the argument directly points to is a right to at least one "fair hearing" on the merits of one's claims, before a judicial or quasi-judicial tribunal characterized by the independence and neutrality of its decision-maker and its use of adversary procedures (or else of some other procedures which allow the claimant both to communicate his own contentions effectively and to secure a thorough probing of his adversary's contentions). The argument does not—at least directly—establish any claim to having one's claims heard and disposed of before a "judicial" as distinguished from an "administrative" body, or by a "judge" as distinguished from a "hearing officer"; nor does it establish any claim to appeal or to judicial review, once a fair hearing has been received.[83]

Of course, there may be subsidiary arguments which would succeed in expanding the due process-inspired access right to mean specifically access to *court* (where judicial jurisdiction exists) and beyond that to include a right to appeal (where appeal would normally be available). Would not serious questions be raised by a state's attempt to maintain two noticeably different sets of *nisi prius* tribunals, one of which charged access fees while the other was available to functionally indigent claimants (and also, perhaps, to anyone else who preferred not to pay fees)? The indigent claimant is entitled to a "fair" hearing opportunity. Precisely how does the hearing he can obtain in the "free" tribunal vary from that offered in the *nisi prius* court of general jurisdiction? Do these variations spell the difference between a hearing opportunity which is fair and one which isn't? If not, why does the state bother to maintain the fee-restricted tribunal—which is presumably more expensive to operate? (If it isn't more expensive, why does it charge fees while the other tribunal doesn't?) I

82. United States v. Kras, 409 U.S. 434, 445 (1973). *See Part I* at 1160.

83. *See* United States v. Kras, 409 U.S. 434, 462 n.5 (1973) (Marshall, J., dissenting); Comment, supra note 8, at 588-89. Thus the decision in Ortwein v. Schwab, 410 U.S. 656 (1973)—though by no means all of the per curiam opinion's reasoning—can be reconciled with the argument in this section. *See id.* at 659-60 & n.4. *Cf.* Comment, *supra*, at 589-90.

do not suggest that these questions will necessarily be unanswerable; but they probably will not be easy to answer. The same arguments are relevant when the question is that of access to an appeal.[84]

B. Governmental Justifications for Court Access Fees

1. *The Doctrines*

The notion of litigation access as a fundamental interest or preferred freedom can be regarded as a doctrinal weapon to be wielded against various governmental practices cramping the exercise or enjoyment of that interest, such as the practice of charging filing fees that have the effect of totally excluding whoever cannot afford to pay them. Still, the question remains whether there might be some sufficient governmental justification for maintaining a filing fee schedule and applying it even to the indigent.

Distinguishable, though overlapping, governmental objectives which might be served by court filing fees seem to include: (1) assurance that the plaintiff has something at stake which is of palpable and particular, as distinguished from merely abstract and theoretical, concern to him—that a genuine "case or controversy" exists and that policies opposed to judicial rendition of advisory opinions will be respected; (2) prevention of litigation where the practical stakes are so small, or the probabilities of victory so remote, as not to be worth the social resources consumed by the litigation process; (3) protection of defendants against harassment by "vexatious" litigation; (4) produc-

84. For indications of how the suggested line of questions might be answered, see Ross v. Moffit, 42 U.S.L.W. 4940 (U.S. June 16, 1974). In addition, of course, one might want to try the approach of Griffin v. Illinois, 351 U.S. 12 (1956), arguing that to divert the claims of functionally indigent persons to one of a pair of tribunals between which others are free to choose, or to deny functionally indigent persons appeals which are accessible to others, constitutes invidious discrimination by wealth forbidden by the equal protection clause. *See* Boddie v. Connecticut, 401 U.S. 371, 388-89 (1971) (Brennan, J., dissenting). Ross v. Moffit, *supra*, bodes ill for this line of argument, although the possibility remains open that the Court would distinguish between refusal of free counsel and imposition of exclusionary fees. It is unclear whether or how far the *Griffin* equal protection theory will be extended beyond the procedural claims of criminal defendants. Following the lead of the *Rodriguez* opinion, it might be hard for an indigent civil claimant who had been granted a fair quasi-judicial hearing, but been denied access to a trial-level or appellate court, to persuade the Supreme Court that he had suffered "an absolute deprivation of a meaningful opportunity to enjoy [the] benefit" of a due-process hearing. 411 U.S. at 20. It is true that the logic of *Griffin* would allow narrower description of the benefit in question, as an opportunity to be heard before a particular tribunal. Yet the *Rodriguez* opinion explicitly treats *Griffin* as a "criminal" case, *see* 411 U.S. at 17-18, 20-22. On the other hand, the argument which would justify confinement of the *Griffin* theory to criminal contexts remains unclear. *See* Brickman, *supra* note 31, at 608-09. See also text accompanying notes 104-06 *infra*.

tion of revenue for the state treasury; (5) allocative efficiency in the economy, achieved by "internalizing" costs to those who stand to benefit from the costly activities.[85]

The first three objectives share a common core of concern with screening out frivolous, unworthy, or objectionable uses of the state's judicial system. But, as the Supreme Court has several times recognized in analogous contexts,[86] the screen provided by flat fees is too crude—too coarse-grained in some respects, too fine-grained in others —to withstand the demands for "close fit" and "least restrictive alternatives" which always arise when government undertakes to regulate exercise or enjoyment of a protected right of interest.[87]

Frivolity, after all, is a matter of degree. So, too, is the deterrent effect of a modest, flat fee—which almost certainly varies inversely with the wealth and income of the prospective litigant. Thus, common sense advises, the wealthy will be deterred only haphazardly; the functionally indigent will be totally "deterred" (if such an odd use of the word is allowable); and the in-between will be deterred to an extent. Modest, flat fees make no dependable contribution to dissuading the affluent from theoretical or extortionate litigation; but they can make it absolutely impossible for the indigent to litigate in good faith. "Deterrence," in any acceptable sense of that term, can be depended upon to operate only on that group of citizens to whom, say, fifty dollars will seem neither a prohibitive sum nor, on the other hand, a trifling amount to pay for the privilege of demanding one's rights.[88]

Moreover, the government has available to it alternative means for controlling abusive resort to the courts—means which plainly are closer-fitting than flat fees and, at least as applied to the functionally indigent, are also plainly less restrictive of the exercise of litigation rights. The most obvious possibility is increased reliance on pretrial screening of individual cases. No doubt this would be adminis-

85. *Compare* Brickman, *supra* note 31, at 638. As a matter of economic analysis, goal (5) may seem to include goals (2) and (3). Yet it is clarifying for legal analysis to distinguish between the all-encompassing goal of efficiency which can be achieved only through a system of "general" or "market" deterrence, and goals cast narrowly enough—in terms of preventing specific "abuses"—to be achievable through "specific" or "collective" deterrence. For the terminology of general and specific deterrence, see generally G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Michelman, Book Review, 80 YALE L.J. 647, 661-66 (1971).

86. *Cf.* Lubin v. Panish, 94 S. Ct. 1315 (1974); Bullock v. Carter, 405 U.S. 134, 145-46 (1972); Lindsey v. Normet, 405 U.S. 56, 78 (1972); Boddie v. Connecticut, 401 U.S. 371, 381-82 (1971); Comment, *supra* note 8, at 584.

87. *See e.g.*, Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

88. *See* Brickman, supra note 31, at 639.

tratively more difficult and expensive than simple reliance on flat fees. Yet any increased costs might well be of that modest or middling magnitude which the Supreme Court would categorize as "administrative convenience" or "efficiency," considerations which the Court has repeatedly said cannot alone justify governmental restriction of enjoyment of protected rights or interests.[89]

We come now to the fourth primary objective—that of raising revenue for the state treasury. Perhaps court filing fees can be explained simply as a general revenue measure, an excise imposed upon the activity of resorting to the tribunals of justice. But if access to those tribunals is, as I have argued, a constitutionally recognized and protected interest, then the Supreme Court's decisions in *Murdock v. Pennsylvania*,[90] *Grosjean v. American Press Co.*,[91] and *Harper v. Virginia Board of Elections*,[92] indicate that an excise which is specially focussed on enjoyment of the protected fair-hearing interest, and in that sense discriminates against such enjoyment, may well be invalid even as applied to persons able to pay the fee.[93]

However, as first indicated in *Cox v. New Hampshire*,[94] and recently confirmed in the air-passenger fee case, *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*,[95] reliance on the unconstitutional-excise analysis is perilous where the exaction is imposed on those who voluntarily seek access to a state-supported facility. In such circumstances, even where access is sought in pursuit of a constitutionally favored interest, the Supreme Court has sometimes allowed the exaction to be justified as a resource-allocating user charge, despite the appearance of rather extreme crudity in the exaction when measured by such a purpose.

This brings us to the fifth primary objective, that of perfecting the allocation of resources by assigning costs to those who choose to incur them. The governmental interest in "resource allocation" is

89. *See, e.g.*, Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791, 799 (1974); Stanley v. Illinois, 405 U.S. 645, 656 (1972).

90. 319 U.S. 105 (1943).

91. 297 U.S. 233 (1936). The *Grosjean* case, involving an excise on newspaper publishing, may be distinguishable because of a discriminatory feature of the excise, indicating that it was actually aimed at disadvantaging certain, particular publishers. *See id.* at 251.

92. 383 U.S. 663 (1966). The "poll tax" invalidated in *Harper* was not an excise on the activity of voting but a capitation tax payable irrespective of voting, *see* Harper v. Virginia State Bd. of Elections, 240 F. Supp. 270, 271 (E.D. Va. 1964), although denial of voting privileges may have been the only sanction actually employed. *Harper* thus may support the proposition in the text *a fortiori*, but supports it in any case.

93. *See* Willging, *supra* note 31, at 283-85.

94. 312 U.S. 569 (1941). *See* Willging, *supra* note 31, at 284.

95. 405 U.S. 707 (1972).

really a congeries of distinguishable interests each of which could rationally be pursued for its own sake. There is, most obviously, an interest in efficiency—in devoting to each use of the judicial system just as many dollars worth of resources, and no more, as cannot be otherwise deployed with a greater output of "welfare" (given the existing distribution of income).[96] Quite distinct in principle from concerns about efficiency, though for economic theorists happily intertwined with them, is the interest in maintaining a "proper" distribution of income. If each person must pay for each use of the justice system the true marginal cost of that use, then the state's provision of justice does not become a vehicle for underhanded disturbance of whatever distribution has otherwise been achieved. Any desired adjustments of, say, the "market" or "natural" distribution is left to explicit, deliberate legislative action.

Although what the Supreme Court did in the *Cox* and *Evansville* cases apparently allows states to justify user-charge restriction of exercise of protected rights by reference to a resource-allocation interest, the Court has not invariably been so permissive. In *Bullock v. Carter* the Court confronted Texas' argument that "since the candidates are availing themselves of the primary machinery, it is appropriate that they pay [in the form of flat filing fees, varied according to the office sought] that share of the cost that they have occasioned."[97] In the course of rejecting that argument, the Court said:

> Viewing the myriad governmental functions supported from general revenues, it is difficult to single out any of a higher order than the conduct of elections at all levels to bring forth those persons desired by their fellow citizens to govern. Without making light of the State's interest in husbanding its revenues, we fail to see such an element of necessity in the State's present means of financing primaries as to justify the resulting incursion on the prerogatives of voters.[98]

96. The previously discussed interest in deterring "frivolous" resort to judicial machinery is in part a cruder version of the interest in efficiency, and perhaps also in part the embodiment of a moral concern about abusive or vexatious resort to judicial process.

97. Bullock v. Carter, 405 U.S. 134, 147-48 (1972). It is interesting to note that the Court's order in *Bullock* invalidated the filing fee practice as a whole, not merely the exclusionary application of the fee requirement to functionally indigent candidates; that is, the Court affirmed a lower court decision which simply enjoined future enforcement, against anyone, of the filing fee requirements. Carter v. Wischkaemper, 321 F. Supp. 1358, 1363 (N.D. Tex. 1970). Yet Chief Justice Burger's opinion often suggests that exclusionary application of fees was the issue before the Supreme Court. *See, e.g.*, 405 U.S. at 141-42 & n.17. That clearly was the issue in the recent case of Lubin v. Panish, 94 S. Ct. 1315 (1974). *See also* Johnston v. Luna, 338 F. Supp. 355 (N.D. Tex. 1972).

98. 405 U.S. at 148-49. *But cf. id.* at 148 n.29.

Texas, in short, could not treat a candidate's use of its electoral system as a "commodity" to be sold only to those willing and able to pay the cost.

May a state, then, treat use of its justice system that way? Is a charge for costs occasioned by one's use of the justice system more like such a charge for use of a publicly financed physical facility, as in *Cox* and *Evansville*, or more like one for use of the electoral system as in *Bullock*? One might think the electoral-system analogy the closer one, insofar as it is true for both the justice system and the electoral system, but not for the use of physical facilities, that the essence of the claim resides in the general prospect of practically available access on an equal or standard footing with every one else.[99] On the other hand, court access may seem to resemble access to streets and airports in posing a need to ration a limited facility susceptible to overcrowding—a need less evident in regard to access to the ballot, but still there when we recall concern for the virtues of "short ballots." In any case, the *Bullock* court was obviously concerned about protecting the access of *voters* as well as that of *candidates* to the electoral system, reasoning that a likely effect of sizeable fee requirements would be to bias the resulting pool of candidates in a manner disadvantageous to the interests of a distinguishable group of voters. Thus a narrow statement of the *Bullock* Court's objection to general use of the fee requirements (and perhaps also of the Court's objection to exclusionary application of fees to functionally indigent candidates) might be that the rights of *voters* must not be made to depend on the willingness or ability of *candidates* to pay fees.

Bullock has undergone subsequent interpretation by the Supreme Court which seems to make it a much surer precedent when we restrict focus to the question of exclusionary impact of filing fees on functionally indigent candidates. On this question, *Bullock* has been assimilated by the Court's commentary in *Rodriguez*[100] into the company of *Griffin v. Illinois*.[101] Texas' resource-allocation argument in *Bullock* was not enough to overcome the crucial facts (as the Court viewed them in *Rodriguez*) that the fees "effectively barred all potential candidates who were unable to pay the required fee" and that "inability to pay [thus] occasioned an absolute denial of a position on the primary ballot." In context, these statements suggest concern about violation of the interests of individual indigent candidates who were effectively excluded by the fees. It is true that in its *Rodriguez* restate-

99. See text accompanying notes 26-36, *supra*.
100. 411 U.S. at 22.
101. 351 U.S. 12 (1956).

ment of *Bullock* the Court also noted that the Texas fees were sizable, "often running into the thousands of dollars,"[102] but it was never clear why that fact should affect application of the effective-exclusion principle, as long as some would be "effectively barred" even by much smaller fees; and *Lubin v. Panish*[103] has now established that the principle covers fees of any size.

The effective-exclusion principle was also, of course, invoked in *Boddie*. Addressing "the State's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment," Justice Harlan's *Boddie* opinion noted that "such a justification was offered and rejected in *Griffin v. Illinois*," and concluded that "the rationale of *Griffin* covers this case."[104] Especially given the breadth and lack of articulation of the rationale tendered in *Griffin*, there is no apparent reason why it would not similarly cover any case in which the exclusionary application of access fees to impecunious litigants is treated as "suspect" because repugnant to the proposed constitutional right of standard juridical access. In this connection, it is interesting to contemplate the Court's remarks about the *Griffin* rationale in *Mayer v. Chicago*:[105] "*Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way .... The State's fiscal interest is, therefore, irrelevant."[106]

2. *The Implications*

In its *Rodriguez* opinion, relying upon *Griffin* and *Bullock*, the Supreme Court indicated that the strict review which attends recognition of some "benefit" as essential to enjoyment of a constitutionally favored interest includes, as one component, a demand for "compelling" justification whenever the state acts or organizes its affairs in such a way that some persons, "because of their impecunity . . . [are] completely unable to pay for . . . [that] benefit, and as a consequence, they [sustain] an absolute deprivation of a meaningful opportunity to enjoy that benefit."[107] A part of strict review, then,

102. 411 U.S. at 22.
103. 94 S. Ct. 1315 (1974).
104. 401 U.S. at 382.
105. 404 U.S. 189 (1971).
106. *Id.* at 196-97. *Cf.* Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972): "Procedural due process is not intended to promote efficiency or accommodate all possible interests; it is intended to protect the particular interests of the person whose possessions are about to be taken."
107. 411 U.S. at 20.

seems to be a very heavy presumption against exclusionary application of state-imposed fees conditioning access to or enjoyment of constitutionally protected rights and interests.

Thus, if we take the *Rodriguez* dicta for all they are worth, we can arrive at a proposition which to some may seem rather startling: Constitutional designation of some personal interest, as one which merits special judicial solicitude against excessive governmental encroachment, is tantamount to a constitutional command that, at least insofar as the government acts as the exclusive source of benefits or services which directly support enjoyment of such an interest, it must provide those services free of charge to the functionally indigent.[108] The startling character of that proposition seems to be simply a reflection of how thoroughly unaccustomed we are to think that anyone can be *entitled* to receive costly benefits without paying for them.

Those who are startled will have to come to terms somehow with the *Boddie*, *Bullock*, and *Griffin* decisions, as well as with the *Rodriguez* dicta. It might help if we could explain the startling doctrine—the heavy presumption against the exclusionary application of state-imposed fees conditioning enjoyment of constitutionally protected rights—as merely an application of demands for "close fit" and "least restrictive alternatives" which everyone seems to accept as appropriate when governments would limit such enjoyment. But such an explanation, though initially appealing, proves to be difficult to sustain.

What resource-allocation purpose is served by exclusionary insistence upon a fee from a person who simply cannot afford to pay it? The special attractiveness of fees—more broadly, prices—as resource allocators lies in their unmatched power to elicit from those for whose benefit costs may (or may not) be incurred the most reliable sort of testimony as to whether the benefits are worth the costs. But no such revelation ensues from attachment of a fee condition to provision of a good or service to persons having no money or credit to spare. To deduce, from a starving pauper's abstention from bread-buying, that giving him a loaf would not yield benefits in excess of costs, is to carry to an absurd extreme a normally healthy skepticism about interpersonal comparisons of utilities. In such a case, an ad hoc collective evaluation of the "worth" of a benefit to a claimant would not only be less restrictive of the claimant's enjoyment of the benefit than would be reliance on an exclusionary fee; ad hoc collective evaluation would also tend strongly to be a somewhat more accurate resource-allocator

108. The question of affirmative governmental duty to assure that indigent persons can procure such services from *someone* is real and important, but beyond the scope of the present discussion. *See* Tribe, *supra* note 11, at 44-50.

than the exclusionary fee, because an exclusionary fee is utterly without discriminating power.[109]

Yet it must be recognized that any collective-evaluation device has its own administrative costs, and that these costs might be greatly multiplied if the use of such devices to screen out unworthy claims could not be confined to cases of functionally indigent persons but rather would have to be extended to all litigants if applied to any. Thus insofar as new collective-evaluation devices are introduced, and the use of existing such devices is increased, to take up slack left by abolition of exclusionary flat fees, it seems quite possible that an increase in administrative costs might result which could more than offset any accompanying resource-allocation gains.

If a state were to argue along these lines for retention of a simple fee system with no exceptions for the indigent, it might look as though the argument would run into the Supreme Court's unwillingness to accept "administrative convenience" and "efficiency" as excuses for a state's not using the "closest-fitting," least "restrictive" means available to achieve its valid objectives, when a constitutionally protected interest is involved.[110] But can the Court maintain this position when the broad goal of allocative efficiency is itself cited as the state's underlying objective? Does the Court's position mean that the broad goal of allocative efficiency (as distinguished from more narrowly defined goals of deterring specific abuses such as vexatious litigation) is utterly unavailable as a justification for governmental practices seriously impeding the exercise of protected rights? The answer to the last question may well be "yes," but that might not render any less startling the implications of *Boddie, Bullock, Griffin,* and *Rodriguez.*

We can try another tack. Imagine that the state offers the following defense of its insistence on pricing the use of its justice system and refusing to make exceptions for the indigent: "It is a mistake to single out any particular good or service, from among all which are available on the market, and then argue that the worth of *that* benefit to a severely impoverished person is not accurately gauged by his offering price. That particular good or service is never the only one which the indigent person wants or needs, and allowing the price system to operate even against him is the best way to discover what *his own* priorities are, given the budgetary constraint imposed by his

109. "Collective" evaluation of the worth of a legal claim would mean evaluation by some official agency, for example a court applying an "amount in controversy" minimum or a rule barring "frivolous" claims. The usage is derived from G. CALABRESI, *supra* note 85, at 95-96.

110. See notes 87, 89 *supra* and accompanying text.

unhappily low income. When someone speaks of a state of 'functional indigency,' and says that for persons in that state pricing works obtusely as a resource allocator and ad hoc collective appraisals of comparative utilities would work better, what the speaker means is that he thinks the net sum of social welfare would be higher if the 'functionally indigent' person had more purchasing power. Now the economically preferable way to redistribute purchasing power from the better to the worse-off is by transfers in the form of money, not particular goods or services, because money allows the recipient who knows best what he wants to spend his additional income as he chooses. But the question of general monetary transfers must be left up to the legislature; and if such transfers do not occur, or do not occur in the magnitudes that some would recommend, we can only conclude that the people of the state, speaking through the legislature, are satisfied with the present distribution of income."

Thus there appears to be an economic goal which can provide a close-fitting justification for the state's insistence on application of court access fees even to its most impoverished citizens, a goal other than the pursuit of allocative efficiency. This goal is the stabilization of some supposedly preferred distributional outcome. In the *Boddie*, *Bullock* and *Griffin* cases, and more generally in the *Rodriguez* dicta, the Supreme Court can be understood as treating such a stabilization goal, along with that of "administrative convenience," as one which cannot justify a governmentally imposed restriction on the exercise or enjoyment of a constitutionally protected right or interest. The very making of that comparison suggests that the Justices may simply not take the stabilization goal very seriously, perhaps because their observations and impressions of our political processes leave them seriously doubtful that the distribution which results from the market as modified by legislated transfer programs is in any intelligible sense "preferred" to that which results if, say, indigents are granted free access to the courts. Such doubts which would be all the more warranted insofar as the Constitution's intimations of special regard for an interest such as that in litigation access are themselves to be supposed constitutive of societal preferences.

In the final analysis, I do not see how it can be denied that the Supreme Court, in the decisions I have cited, has in effect been suggesting that the Constitution contains an itemized list of some of the components of an ideal concept of minimum economic capacity.[111] So

111. Similar results follow from an analysis of the related concept of equal opportunity. *See* Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973).

those who are startled may have reason to be startled. And all of us can continue to ponder the puzzle, to which I have previously called attention, of what the "state action" part of fourteenth amendment liability can possibly mean in the context of a constitutional purpose to specify the components, or some of them, of a "just minimum."[112]

C. Conclusion

I have presented a two-step argument for the proposition that court access fees may not constitutionally be applied to those who cannot afford to pay them: first, there is a doctrine opposed to governmentally imposed fees which have the effect of excluding indigent persons from the enjoyment of constitutionally favored interests; second, persons do have a constitutionally favored interest in a standing opportunity to avail themselves of whatever juridical processes are normally available to members of the community.[113]

Now I am aware that these propositions, and others of their kind carry in their train a riddle: How is it possible to provide effective juridical access for the necessitous, by a fair method that assures against the two related evils of prodigal or prohibitive expense and—especially—of over-compensating the necessitous at the expense of the borderline poor, not to mention the so-called affluent? It is the riddle of what to substitute for salutary economic deterrence, when use of economic deterrence is constitutionally disallowed against the functionally indigent.[114] An imaginable answer, assuming that the attack is confined to state-imposed access fees, would be that the problem surely will not materialize as long as no public provision is made for equipage.[115] Relief from access fees alone, it might be argued with some plausibility, will open no floodgates of frivolous litigation. But that answer would be merely facetious on the part of one who, like myself, is not ready to deny that the right of effective access does truly encompass provision for equipage, too (though whether or how the courts should undertake enforcement of the equipage part of the right is another question).[116]

112. *See* Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 11, 13, 31-32, 39, 55-56 (1969).

113. Or at least persons have a constitutionally favored interest in receiving some sort of fair hearing when they assert legal grievances. See notes 83-84 *supra* and accompanying text.

114. But it is not completely disallowed. See Fuller v. Oregon, 42 U.S.L.W. 4770 (U.S. May 20, 1974), upholding a "recoupment" scheme.

115. *See Part I*, at 1163.

116. For discussion of some possible justiciable handles on the problem, see Brickman, *supra* note 31, at 641-49.

The fact may be that the deterrence problem is not fully soluble at the level of constitutional adjudication, where courts decide whether to recognize or not to recognize claimed constitutional rights. The problem is thus intractable because it is, as it crops up in these contexts, a mere symptom of an underlying, for all I know ineradicable, element in the organization of our society and, for all I know, of all imaginable modern societies. That element is simply that some persons find themselves in the predicament of functional indigency.

That the existence of functional indigency is the key to the deterrence riddle may easily be seen. If there were no persons in that state, there would be nothing in the way of the state's rationing access to its scarce or costly facilities by a price mechanism. Everyone would be able to pay for constitutionally guaranteed access, and still provide himself with the other necessities. Everyone, then, could fairly be subjected to economic deterrence and the riddle would be solved.

On the other hand, the existence of functional indigency seems to be an injustice by definition.[117] Claims to free access for the functionally indigent—the very claims that stir up the deterrence problem —of course are rooted in that very perception of injustice. So the riddle posed by free access claims is a riddle, one might say, with a moral function—a riddle that pricks our social conscience.

There are times, and the *Kras/Ortwein* episode strikes me as one of them, when courts seem to be acting as though it were an elevated form of judicial artistry to help us block out troublesome moral riddles—an effect which a court can achieve by studiously refusing to name a right a right, to name an injustice an injustice. Now is *that* the judiciary's mission: moral anaesthesiology? Or is it not a high judicial function, when the context is appropriately judicial and the legal merits are tolerably clear, to confront us with—not to save us from—the riddles that prick our consciences?

APPENDIX: REMEDIAL SELF-HELP AND "STATE ACTION"

In this appendix I consider in somewhat speculative fashion the proposition that private actions causing harm to others become "state action" covered by the procedural due process guaranty, as soon as remedial justifications are summoned to purge such actions of a wrongful, liability-producing, quality they would otherwise have.[118]

117. That is, a person is called functionally indigent when he cannot afford the prices normally charged for *all* the goods and benefits to which he is justly entitled.

118. A remedial justification is one referring to an inequity previously introduced

The argument for this proposition partakes of the "public function" or "state function" approach to the question of "state action."[119] In a somewhat superficial vein, the claim would be that coercive correction of interpersonal inequity—call it corrective justice—is intrinsically, by its very nature, the proper business of the state, so that when self-interested private agents are permitted (and thereby, to some extent, encouraged) to take corrective action on their own behalf ("self-help"), the state must be viewed as having "delegated" the function of securing corrective justice to such agents, for reasons of efficiency or whatever. One need not argue that the state's responsibility for corrective justice is a "non-delegable" one in order to maintain that procedural safeguards which attend this function when performed by state officials must follow along when the function is shifted to private agents.

Of course the claim that corrective justice is "intrinsically" a state function requires support. Not much is added by a bare assertion that there is a general understanding to this effect (though there may be one), or that the social contract so stipulates. But the contractarian tradition does suggest some important reasons why the function of corrective justice might be regarded as allocated to the state, at least in the sense that procedural safeguards applicable to "state" action must attend this function whoever may be called upon, or allowed, to perform it.

Contractarians, certainly those of the Lockean mainstream, tend to view the problem of corrective justice as perhaps *the* premier impediment to satisfactory social life in the state of nature. It is all very well to say that one who has suffered violation of his natural rights may punish or exact reparation from the violator; but there remains the universally perceived difficulty of an extreme likelihood of disagreement about the question of violation or the appropriate measure of requital, leading to endless chains of corrective countermeasures and quite undermining the conditions of security and social peace. The felt need for an authoritative and impartial forum for control of such disputes—an essential and integral component of which is a fair hearing for each disputant—is a main prop of the libertarian justification of the state.[120]

Only minor expansion of this simple insight is needed to support a strong argument that corrective "self-help" ought to be deemed state action for purposes of procedural due process guaranties. Viewing the situation from the agent's standpoint, it makes good sense to fear that normally efficacious restraints on private actions calculated to harm another, including both conscientious self-restraint and extralegally manifested community disapprobation, will tend to wear thin where the circumstances of corrective

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into the relationship between agent and victim, which inequity the action under scrutiny is designed to correct or resolve.

119. *See, e.g.*, Clark & Landers, *supra* note 41, at 377-82.

120. *See generally* R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

justice apparently prevail. It is perhaps all too easy to persuade oneself of the appropriateness of one's conduct where a remedial justification beckons, and also too easy to believe that if one does err the community's adverse judgment will tend to focus on the mistake of judgment—a merely instrumental defect—rather than on one's innate lawlessness or moral defect. The mistake will be "deplorable" but "understandable," and it will not deeply taint the agent's public character or self-image. From the victim's standpoint, the emotional response to having been visited with harm under the false pretense of punishment or requital may be more acute than the response to injury heedlessly, or brutishly, or churlishly inflicted. Heedlessness surely is less fruitful of resentment than design—a truth illustrated by the social practice of apology. At the same time, those who injure brutishly or churlishly thereby indicate their moral inferiority and are perhaps for that reason less resented—one can partially assuage one's injury by retreat to the attitude of moral superiority, and at least one's own character has not been placed in question by acceptance of injury having a corrective look about it. It is far harder to turn the other cheek to those who purport, though with doubtful justification, to be wreaking just deserts upon one. And a chief strain in the special resentment stirred by unjustified requital certainly will be—if it is true—that one has not had, and is not to be given, a fair opportunity to show that the requital is truly undeserved. In sum, there may be special risks, both of the incidence of unjustifiable injury and also of socially debilitating emotional responses to such injuries, associated with any suggestion that an injurious action is remedial or corrective; and the nature of these special risks points straight to a "due process" transaction as the appropriate risk-reducing measure.

The practical implications of all this are uncertain. On one view, they are staggering. Since a large proportion of privately inflicted, non-accidental harms are imaginably or potentially remedial, it might follow that every such harm could be brought as a federal case—a deprivation without due process because of failure to provide a prior hearing. This seems inconceivable. Thus to give the notion of corrective justice as a state function some bite, we might repair to the more modest proposition that the due process requirement attaches only to such injurious actions as are *purportedly* remedial. But this formulation seems, as a practical matter, to boil down to the proposition that a victim who becomes a plaintiff in a civil action has a due process right not to have his action defeated by a remedial justification, unless he had a prior opportunity for a hearing satisfying the formal requirements of due process.

Such a proposition, if legally sound, would not be without important consequences. It would, for example, have the effect of emasculating section 9-503 of the Uniform Commercial Code and all other state-law doctrines designed to allow self-help. But there is no self-evident logic connecting the proposition with a general right on the part of would-be plaintiffs not to be prevented by access fees from bringing their actions.